NO. 411

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CHARLES MULLEN,

Petitioner,

-vs-

FITZ SIMONS & CONNELL DREDGE & DOCK CO., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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FITZ SIMONS & CONNELL DREDGE & DOCK CO., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, CHARLES MULLEN, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE MATTER INVOLVED

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This action was brought under the special rule for seamen to sue without surety and prepayment of fees to recover damages for personal injuries sustained while in the employ of the defendant-respondent, for maintenance and cure and damages for failure to provide expenses of maintenance while incapacitated.

The defendant-respondent made a motion for a directed verdict at the close of all the evidence in the case, and the court reserved its ruling thereon. The jury rendered a verdict on April 6, 1950, for the plaintiff-petitioner in the sum of FORTY-FIVE HUNDRED DOLLARS ($4500.00) damages. The court on October 17, 1950, entered an order sustaining the motion of the defendant-respondent for a directed verdict, and dismissing the plaintiff-petitioner's cause and assessed costs against him from which an appeal was taken to the United States Court of Appeals.

This case has been before this court before on the legal sufficiency of the pleadings, 172 F. (2d) 601, Case No. 9591; cert.den. U.S. Supreme Court, June 27, 1949; 337 U.S. 959.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment as to Count I of the Complaint, and reversed and remanded the judgment of the District Court as to Counts II and III of the Complaint, and remanded the cause for further proceedings under said Counts II and III of the Complaint.

The opinion of the United States Court of Appeals of the Seventh Circuit is reported in 191 F. (2d) 959, and contains a complete statement of the facts. Petition for Certiorari to the Supreme Court of the United States was denied.

On remand in the United States District Court, Findings of Fact and Conclusions of Law in Admiralty were made and order entered, that Counts II and III of the Complaint, sounding in Admiralty, for Cure and Maintenance, be dismissed on the merits and all questions of costs reserved until the further order of the court.

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An Appeal was taken to the United States Court of Appeals of the Seventh Circuit and on October 7, 1952 that court affirmed the Decree of the District Court. A Stay of Mandate was granted, pending the prosecution of certiorari herein.

The decision of the Court of Appeals in effect holds that a seaman forfeits his right to medical cure and maintenance, where the injuries are caused solely by the seaman's own willful disobedience of orders and culpable failure to perform his known duty in service of the ship, and is further deprived of his right to expenses of medical care and cure because he is required to avoid such expense by use of the free services of the Marine Hospitals of the United States Public Health Service, and that the availability of this service prevents his recovery for maintenance as well as cure, all contrary to the applicable decisions of the United States Supreme Court.

THIS COURT HAS JURISDICTION

This Petition is authorized by Title 28, United States Code, Section 1254 (2) whereby this Court has explicit authority to review by certiorari cases in the Court of Appeals "before or after rendition of judgment or decree."

The decision of the Court of Appeals has decided Federal questions "in a way probably in conflict with applicable decisions of this Court" and "has so far departed from the accepted and usual course of "judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

QUESTIONS PRESENTED

1. Whether the plaintiff forfeited his right to medical cure and maintenance at the expense of the defendant-appellee by reason of evidence in the case substantiating that the injuries to the plaintiff-appellant were "caused solely by the seaman's own willful disobedience of orders and culpable failure to perform his known duty in the service of the ship."

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2. Whether an injured seaman is deprived of his right to expenses of medical care and cure because he is required to avoid such expense by use of the free services of the Marine Hospitals of the United States Public Health Service, and that the availability of this service prevents his recovery for maintenance as well as cure.

3. Whether or not there is evidence in the record sufficient to enable the court to fix the amounts due the plaintiff-appellant for maintenance and cure.

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REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals in effect holds that the plaintiff seaman forfeited his right to maintenance and cure because of alleged willful disobedience of orders and culpable failure to perform his known duty in the service of the ship, despite the fact that there is no evidence in the record to support any charge of "willful" disobedience or "culpable" failure on the part of the seaman plaintiff. There are no facts in evidence in the case at bar to warrant the application of that principle.

Warren v. U.S., 340 U.S. 523-528

is in favor of the recovery on the part of the plaintiff in the case at bar, and the facts in the instant case with reference to the conduct of the plaintiff are conclusive that there was no willful disobedience of orders or culpable failure to perform his known duty. He simply omitted to close a door in a galley when the ship was in rough weather, which brought about his injury.

2. The Court of Appeals in its decision to the effect that the plaintiff should be denied expenses of cure because the defendant tendered him admission to the Maritime Hospital, is in error and contrary to the decisions and established authority.

48 Am.Jur. - Shipping - Par. 175
Holt v. Cummings - 102 Pa. 212, 48 Am. Rep. 199
Anno. 4 - L.R.A. (N.S.) 77
7 Ann. Case. 209

3. The Court of Appeals erred in failing to give the plaintiff judgment de novo in Admiralty for $1,606.21 with interest at 7% from September 29, 1947.

WHEREFORE, Petitioner respectfully prays that Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit to the end that the record in the appeal styled CHARLES MULLEN, Appellant -vs- FITZ SIMONS & CONNELL DREDGE & DOCK CO., a corporation, Appellee, No. 10322 on the docket of said Court of Appeals may be brought before

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this Court for review, and the judgment of said Court of Appeals reversed, and the cause remanded with directions to reverse the judgment of the District Court in toto and to enter judgment in the amount of $1,606.21 in favor of the plaintiff-petitioner, CHARLES MULLEN.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO._____

CHARLES MULLEN,

Petitioner,

-vs-

FITZ SIMONS & CONNELL DREDGE & DOCK CO., a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported in : 198 F. (2d) Advance Sheets - Volume 5 - and appears in full in the certified copy of the record in that Court.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (2). The Court of Appeals has decided important federal questions of federal law "in a way probably in conflict with applicable decisions of this Court," and in a way in conflict with the decisions of the Court of Appeals for other Circuits and "has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Supreme Court Rule 38 (5) (b).)

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The opinion of the Court of Appeals was filed on October 7, 1952.

STATEMENT OF THE CASE

This action was brought under the special rule for seamen to sue without surety and prepayment of fees to recover damages for personal injuries sustained while in the employ of the defendant-respondent, for maintenance and cure and damages for failure to provide expenses of maintenance while incapacitated.

The defendant-respondent made a motion for a directed verdict at the close of all the evidence in the case, and the Court reserved its ruling thereon. The jury rendered a verdict on April 6, 1950, for the plaintiff-petitioner in the sum of FORTY-FIVE HUNDRED DOLLARS ($4500.00) damages. The Court on October 17, 1950, entered an order sustaining the motion of the defendant-respondent for a directed verdict, and dismissing the plaintiff-petitioner's cause and assessed costs against him from which judgment an appeal was taken to the United States Court of Appeals.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment as to Count I of the Complaint, and as to Counts II and III reversed and remanded the judgment with directions to proceed further in a manner consistent with the Court's opinion.

Petitioner is cognizant of the directive stated in this Court's Rule 38, (2) that a supporting brief on certiorari must be direct and concise. Accordingly, Petitioner prays this Court's indulgence to set forth the facts in the cause at some length. The full force of the objections to the decision of the United States Court of Appeals cannot be presented otherwise. A further consideration prayed for is that the Petitioner is filing, simultaneously, his Petition to prosecute certiorari on typewritten papers, and that said proceedings may be had upon the certified transcript of the proceedings

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had in the court below. A more complete statement of the facts herein pertaining to the cause of action will greatly facilitate an understanding of the issues presented.

This case has been before this Court before on the legal sufficiency of the pleadings. 337 U.S. 959 denying certiorari to 172 F (2d) 601, and again on the matter of the dismissal of plaintiff's claim for damages under the Jones Act with certiorari denied by this Court.

CHARLES MULLEN, the Petitioner, a single man, fifty-two (52) years of age, was employed as a deckhand and linesman by the defendant-respondent, FITZ SIMONS CONNELL DREDGE & DOCK CO., aboard its tug, the Roche, at Indiana Harbor on September 29, 1947. His rate of pay was $12.20 per day. Tr. 25-27.

The crew on the Roche on the day in question consisted of the Captain, two firemen, MULLEN, the linesman, and an engineer. An agent and employee, of the defendant-respondent, together with a scowman were also aboard. At about ten minutes to 7:00 A.M., pursuant to orders, MULLEN let go his lines, and the tug set out to have a look at the weather in the lake. Tr. 28-29.

The Tug Roche is about 76 feet in keel length, has about a 20 foot beam, and 12 feet 6 inches in depth. It has an overall length of 83 or 84 feet. On the day in question, she was about 14 inches of her depth above the water line. The tug has a deckhouse and pilot house. The pilot house is in the forward part of the vessel, and in rear of the pilot house is the deckhouse to which there are doors for ingress and egress. Tr. 152-154.

In the rear of the deckhouse is a galley. A door led down into the same. This door was around 5 feet high, and about 3½ feet wide. There was a combing about the door. The door was not flush with the deck. This door was made of steel and suspended in the casement on hinges. In closing the door swung aft. This door was kept open by a kind of hook against the steel deckhouse. This drop

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hook was fastened to the steel deckhouse and slipped over the entire top of the door in order to hold the same open.

The Captain headed the tug through Indiana Harbor in an easterly direction towards Lake Michigan. The water in the Harbor near the dock was choppy.

In Indiana Harbor there are breakwaters facing the Lake. One runs east and another has a red blinker light called the inside light. The main breakwater has a green light thereon. There is a gap in the breakwaters through which the tug proceeded. The waves were very high on the breakwater, and the spray from the waves came up over the catwalk which is around 40 or 50 feet high. The waves were coming up over the top part of the catwalk and breakwater. The Tug Roche proceeded through the gap, and past the white light into the lake proper. MULLEN was engaged in unloading ashes at the time from the fire hole of the vessel and dumping the same overboard. MULLEN did not know when they started out that the tug was going out into the lake proper. When he saw they were going out into the lake, and had already arrived there and a large wave was about to strike the vessel, he dropped the ash bucket and ran back 10 or 15 feet to the galley steps in order to avoid being washed overboard. The deck was awash with the waves hitting the Roche. MULLEN jumped into the companionway and landed on the first or second step, the waves following him in. When he jumped into the companionway, he grabbed hold of a sill of the door in order to steady himself and prevent himself from falling. His fingers slipped into the jamb of the door, and the vessel was rolling. The hook failed to hold the door which slammed upon his fingers and hand, pinching them between the edge of the door and the sill. Tr. 31-37.

The tug was turned around into the lake and headed for the dock in the harbor. A tourniquet was applied to MULLEN'S arm. First aid was given him at the Infirmary at the dock. He was then taken to the Indiana Harbor Clinic; thereafter to St. Catherine's Hospital

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where he remained for a period of about eight or nine days. MULLEN suffered severe and steady pain all the time he was in the hospital and for months thereafter. After leaving the hospital, MULLEN was required to make tri-weekly visits to the clinic at Indiana Harbor for medical treatment. He was finally discharged by the clinic on December 26, 1947. These trips cost him $5.01 for a round trip. MULLEN was laid up and unable to work until May 17, 1948. At the time of the trial in April of 1950, MULLEN, the plaintiff-petitioner, was not able to close his hand. He was unable to hold a bar, which interfered with his work as a linesman or fireman. Tr. 38-46.

It cost MULLEN $5.00 a day for food and maintenance and no part of this maintenance was paid to him by the defendant-respondent, FITZ SIMONS CONNELL DREDGE & DOCK CO., nor did they reimburse him for the amount due him in getting medical attention at the Indiana Harbor Clinic to which he made his tri-weekly periodical visits from the City of Chicago. MULLEN sustained an approximate forty per cent (40%) functional loss in the use of his right hand. Tr. 95, 96.

The purpose of taking the tug out to look at the weather was to ascertain how much sea was running, and to determine whether or not conditions were such as to permit work under the weather conditions in question. The tug was run out about a 1/4 mile into the lake beyond the furthest breakwater and light. Tr. 158, 159.

The Plaintiff recovered a verdict of FORTY-FIVE HUNDRED DOLLARS ($4500.00) before a jury in the District Court and the Court subsequently thereto having reserved its ruling on a motion for a directed verdict sustained said motion and entered a judgment for the Defendant. On appeal to the United States Court of Appeals, 191 F (2d) 959, certiorari denied in the United States Supreme Court, the Court of Appeals affirmed the judgment of the District Court, dismissing Plaintiff's Complaint for Damages under the Jones Act and reversing and remanding the judgment with reference to Counts II and III of the Complaint for maintenance and cure with directions. Thereafter, the

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United States District Court made its findings and conclusions of law in Admiralty, dismissing Plaintiff's Complaint for maintenance and cure which Decree was affirmed by the United States Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to award judgment for the Plaintiff in the sum of $165.33 for medical expense and cure; $1,160.00 for maintenance and $280.88 for costs, or a total of $1,606.21, together with interest at the rate of 7% per annum from September 29, 1947.

2. In denying the Plaintiff recovery for maintenance and cure under all the facts and circumstances in this case.

3. In holding that the Plaintiff forfeited his right to maintenance and cure by reason of alleged willful disobedience of orders, and culpable failure to perform his known duty in the service of the ship.

4. In holding that the Defendant discharged its liability for expense of cure by tendering Plaintiff a ticket of admission to the Marine Hospital of the United States Public Health Service.

5. In failing to award Plaintiff judgment de novo in Admiralty.

6. In holding that findings 9-14 inclusive are supported by substantial evidence whereas it should have found the contrary thereof.

SUMMARY OF ARGUMENT

I.

PETITIONER IS ENTITLED TO JUDGMENT UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE FOR MEDICAL CURE AND MAINTENANCE, WHICH RIGHT ARISES OUT OF THE MARITIME EMPLOYER-EMPLOYEE RELATIONSHIP, IRRESPECTIVE OF NEGLIGENCE OR FAULT ON THE PART OF THE RESPONDENT, AND IN THE ABSENCE OF WILLFUL MISBEHAVIOUR, VICIOUS CONDUCT, OR WILLFUL DISOBEDIENCE OF ORDERS BY THE PETITIONER.

(a) On an Appeal in Admiralty to the Court of Appeals Petitioner is entitled to a trial de novo.

North.Pac.Coast R.Co. v. Hall, 200 U.S. 619
Gilchrist v. Chicago Ins. Co. 104 F.566 (7th CCA)
Downs v. Great Lakes Transit Corp. 5 Fed. (2d) 58
The Lydia 1 F. (2d) 18

(b) Findings and Conclusions adopted practically en toto as submitted by Proctors are not entitled to the same weight and dignity as Findings and Conclusions representing the unfettered and independent judgment of the trial judge.

Matton Oil Transformer Corp. v. The Dynamic
125 F. (2d) 999
The Severance 152 F. (2d) 916, cert.den. 328 U.S. 853

(c) Petitioner is entitled to maintenance and cure irrespective of any negligence on his part.

Mullen v. Fitz Simons & Connell Dredge & Dock Co.
191 F. (2d) 959
Aguilar v. Standard Oil Co. 318 U.S. 724

(d) Petitioner was not guilty of any vicious misconduct, culpable neglect of duty, willful disobedience of orders such as to deny him his right to maintenance and cure.

Warren vs. United States - 340 U.S. 523
Barlow vs. Pan Atlantic S.S. Corp. 101 F. (2d) 697

(e) Petitioner is entitled to interest on this Appeal.

Hagerman v. Moran (1896) 75 F. 97 (CCA 9th)
The Glenochil (1904) 128 F. 963 (D.Del.)
The Gladiator (1898) 223 F. 381
The Axby (1897) 83 F. 720 (CCA 4th)

(f) A disabled seaman is not obliged to accept an offer of treatment in the Public Service and Marine Hospital but may require the vessel to fulfill its obligation in reference to care and medical attention.

48 Am.Jur. - Shipping - Par. 175
Holt v. Cummings - 102 Pa. 212, 48
Am. Rep. 199
Anno. 4 - L.A.R. (N.S.) 77
7 Ann. Cas. 209

(g) The Court of Appeals may allow the Petitioner his costs in the District Court as well as Appellate costs.

Todd Erie - Basin Dry Dock v. Penelope-148 F(2d) 824

A R G U M E N T

I.

PLAINTIFF-PETITIONER IS ENTITLED TO JUDGMENT UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE FOR MEDICAL CURE AND MAINTENANCE, WHICH RIGHT ARISES OUT OF THE MARITIME EMPLOYER-EMPLOYEE RELATIONSHIP, IRRESPECTIVE OF NEGLIGENCE OR FAULT ON THE PART OF THE DEFENDANT-RESPONDENT, AND IN THE ABSENCE OF WILLFUL MISBEHAVIOUR, VICIOUS CONDUCT, OR WILLFUL DISOBEDIENCE OF ORDERS BY THE PLAINTIFF-PETITIONER.

***

The District Court and the Court of Appeals adopted in toto the findings of fact and conclusions of law submitted by the Defendant-Respondent herein, and entered its final decree thereon, thereby embodying Defendant's theory of the case that the Plaintiff herein was not entitled to maintenance and cure, because (1) Plaintiff forfeited this right by alleged willful disobedience of orders and culpable failure to perform his known duty in the service of the ship, (2) that the Plaintiff was required to go to the Marine Hospital of the U.S. Public Health Service and accept its services and thereby avoid the expense of cure and maintenance on the part of the Defendant employer, and (3) there is no proof in the record of any amount owing Plaintiff for cure and maintenance.

On an appeal in Admiralty to the Court of Appeals, the Appellant is entitled to a trial de novo. North Pac. Coast R.Co. v. Hall, 200 U.S. 619; Gilchrist v. Chicago Ins. Co. 104 F. 566 (7th CCA); Drowne v. Great Lakes Transit Corp. 5 Fed. (2d) 58; The Lydia 1 F (2d) 18.

Although the District Court is privileged to seek such aid, as it thinks desirable, findings and conclusions adopted practically in toto as submitted by Proctors are not entitled to the same weight and dignity as findings and conclusions representing the unfettered and independent judgment of the trial judge.

Matton Oil Transformer Corp. v. The Dynamic
125 F. (2d) 999

The Severance 152 F. (2d) 916, cert. den.
328 U.S. 853

A seaman's contract contemplates the application of the General Maritime Law, and the law confers the right to maintenance and cure in case of injury incurred irrespective of negligence, while he is in the ship's service; the seaman's Admiralty rights to maintenance and cure have a scope as broad as his employment.

The United States District Court in connection with the former Appeal in this case made a memorandum decision on the trial, and insofar as it relates to the proposition of maintenance and cure, said:

> "Plaintiff offers a third objection to the motion for directed verdict. He contends that Plaintiff was entitled to verdict for medical cure and care and maintenance which right arises out of the maritime employer-employee relationship irrespective of negligence or fault on the part of the Defendant.
>
> "However, Plaintiff has disqualified himself from all rights to maintenance and cure. He disobeyed his orders, disregarded the duty placed upon him as a deckhand to his ship, his shipmates and to himself. He suffered injury as a result; he cannot throw the consequences of his own dereliction upon his employer. An injured seaman is entitled to his expenses of maintenance and cure, if any, arising out of maritime injury, irrespective of negligence or fault of the ship-owner so long as he also is free of conduct which renders the placing of the responsibility upon the ship-owner contrary to the purposes for which the concept of maintenance and cure was designed, that is, so long as he is free of misconduct or indiscretion or of disobedience of orders and disregard of his seaman's duties .....
>
> "Plaintiff has disqualified himself from all rights to maintenance and cure as a consequence of his own misconduct."

Before the United States Court of Appeals, with reference to this proposition of the denial of Plaintiff's right to recovery for maintenance and cure, the Plaintiff argued in his Brief, as follows:

> "Count III of the Complaint demanded Five Thousand Dollars ($5,000.00) damages for expense of Plaintiff's maintenance during the time he was recovering from his injuries, and for failure to pay same to him.
>
> "Nowhere is there any defense offered to this Count of the Complaint by way of evidence....
>
> "U.S.C.A. 7th in 172 F. (2d) 601, in this very case, held that the Plaintiff had a right to include a

Count for his maintenance and for cure along with the Count for his cause of action under the Jones Act, irrespective of diversity of citizenship. The Court further held that Plaintiff's right to maintenance 'is not a matter of election; the seaman has it in any event regardless of proof of negligence or of unseaworthiness.' The Court held that care and maintenance could be obtained in the same action for indemnity under the Jones Act.

"The right of a seaman to maintenance and cure arises irrespective of any negligence or fault on the part of the shipowner. In Aguilar v. Standard Oil Co. (1942), 318 U.S. 724), the Court held that a shipowner's liability for maintenance and cure extends to a seaman who departing or returning from shore leave (though without any duty to perform for the ship while on leave) is injured while proceeding without misconduct across a dock or other property which was the only available route between the vessel and the public street. Liability in such case does not depend upon whether the shipowner was negligent. In this case one sailor fell into a ditch while leaving the dock and another while crossing the dock was struck by an automobile driven by a stranger, and in his suit he asked for $10,000. for maintenance and cure from the shipowner. The United States Supreme Court reversed a decision of the District Court and the C.C.A. dismissing this cause of action.

"JUDGE RUTLEDGE in speaking of maintenance and cure at Page 730, says:

> 'Created thus with the contract of employment, the liability unlike that for indemnity or that later created by the Jones Act in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense for curing it as an incident to the Marine Employer-employee relationship. So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Peterson v. The Chandos 4 (f) 645 (D.C.) See also J.F. Carel 43 F. 92 (D.C.); The Ben Flint 1 (U.S.) 126, 3 Fed. Case, 1299 (D.C.). Conceptions of contributory negligence, the fellow servant doctrine and assumption of risk have no place in the liability or defense against it. Only some willful misbehaviour or deliberate act of indiscretion suffices to deprive the seaman of his protection. The Ben Flint supra. The traditional instances are venereal disease, and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of the known predisposition of sailors ashore. (See the Quaker City 1 F. Supp. 840 (D.C.). Other recent cases disclose a tendency to expand these exceptions.'

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"The Court here says that MULLEN, the Plaintiff, disobeyed orders .....The Court overlooked the law as set forth in the cases hereinbefore cited to the effect that contributory negligence does not bar a recovery in actions under the Jones Act. There is no evidence of any 'misconduct or indiscretion or of disobedience of orders, and disregard of his seaman's duties' on the part of the Plaintiff, MULLEN .....

"Any and all acts on the part of MULLEN at the time of the accident in question could not, in any way, be brought within the rule that his acts were of such a willful and malicious nature, so as to indicate almost moral turpitude in bringing about the injuries to himself, so as to deprive himself of the right to maintenance. He did nothing to bring about his injuries, which would fall within the rule of any of the cases cited by Defendant for this proposition.

"Judge Sullivan in holding that Plaintiff-Appellant, MULLEN was disqualified from all his rights to maintenance and cure as a consequence of his own misconduct cites no authority for this ruling. (Tr. 267-268). There is a line of cases that deal with the willful misconduct of seamen in bringing about their own injuries, but none of these cases are applicable to the factual situation in the case at bar.

"MULLEN was not drunk. MULLEN was not diseased. MULLEN was guilty of no willful misconduct contributing to his injuries in the nature of the type of conduct which would save the employer harmless for maintenance.

"In Barlow v. Pan Atlantic S.S. Corp. 101 F. (2d) 697, the seaman fell down a ladder while drunk. Of course, in the case of such willful misconduct, there is no responsibility on the employer to provide the seaman with maintenance and cure. Contributory negligence is no defense under the Jones Act, nor does contributory negligence on the part of the seaman absolve the employer from his obligation to provide maintenance and cure.

"Gross misconduct or negligence on the seaman's part may defeat his recovery, but that degree is seldom found by the Courts. 'By the Maritime Law, the mere ordinary negligence of the seaman though that be the sole cause of the accident, makes no difference in his right to be cured at the ship's expense, and to his wages to the end of the voyage.' City of Alexandria, 17 Fed. 390. Even the injured seaman's own alcoholic saturation is sometimes overlooked in recognition as Justice Rutledge says, 'of a classic predisposition of sailors ashore.' Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724."

In Warren vs. United States, 340 U.S. 523 (Feb. 1951) the Petitioner, a messman on a ship owned by the United States went on shore on leave while the vessel was at Naples. He and two other members of the crew did some sightseeing, drank a bottle of wine together, and then spent one and one half (1-1/2) hours at a dance hall. A room adjoining the dance hall and overlooking the sea had French doors opening onto an unprotected ledge. Petitioner stepped onto the ledge, grasped an iron rod

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which seemed to be attached to the building and leaned forward to take a look. The iron rod broke off and Petitioner lost his balance, fell and broke his leg. The Supreme Court held that the Petitioner was entitled to recover expenses of maintenance and cure from the United States and that his injury was not due to a willful act, default or misbehaviour, and that recovery was not barred thereby. The United States District Court had awarded maintenance and cure to him. 75 F. Supp. 210, 76 F. Supp. 735. The Court of Appeals disallowed it, 179 F. (2d) 919 and on certiorari to the United States Supreme Court the decision of the Court of Appeals was reversed, 340 U.S. 806.

At Page 528, Mr. Justice Douglas said:

"The standard prescribed is not negligence but willful misbehaviour. In the Maritime Law it has long been held that while fault of the seaman will forfeit the right to maintenance and cure, it must be 'some positively vicious conduct such as gross negligence or willful disobedience of orders.'

The Chandos 6, Sawy. 544, 549-550;
The City of Carlisle, 39 F. 807, 813;
The Ben Flint 1 Biss. 562, 566; and
See Read vs. Canfield (1) Sumn. 195, 206.

"In Aguilar vs. Standard Oil Co., 318 U.S. 724, 731, we stated the rule as follows:

'Conceptions of contributory negligence, the fellow servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some willful misbehaviour or deliberate act of indiscretion suffices to deprive the seaman of his protection.'

"* * * The Petitioner was plainly negligent. Yet we would have to strain to find the element of willfulness or its equivalent.* * * His conduct did not measure up to the standard of due care under the circumstances, but we agree with the District Court that it was not willful misbehaviour, etc."

In the case at bar, this Court has found that MULLEN failed to prove any negligence on the part of the Defendant, and no evidence of unseaworthiness, and that he failed to sustain his burden of proof on his claim of negligence. The Court further found that his injury was caused solely by his failure to perform his known duty as a

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deckhand; that he did not shut the galley door when he saw that the tug was going out into the lake in a heavy sea and that his own negligence was the proximate cause of his injury. This Court has not found that he was guilty of any "willful disobedience of orders and culpable failure to perform his known duty in the service of the ship" as set forth by the District Judge in his memorandum opinion as the basis for his findings and the entry of the Decree against the Plaintiff.

There is no evidence in the record to support any charge of "willful" disobedience or "culpable" failure on the part of MULLEN.

This Court in its decision 191 F. (2d) 85 appeared to have adopted this view of the law as to Plaintiff's right to maintenance and cure as contended for by the Plaintiff.

The Defendant-respondent on the former Appeal, 191 F. (2d) 85 argued that the Plaintiff-petitioner was not entitled to maintenance and cure because on the evidence, he was guilty of misconduct of the degree and kind described in the opinion of the United States Supreme Court in Warren vs. U.S. 340, U.S. 523 and that his right to maintenance and cure was forfeited because his conduct came within the exception to the general rule which entitled him to maintenance and cure. The Court of Appeals did not adopt that view of the evidence, but held that he was entitled to his maintenance and cure provided he produced evidence showing the amount due him therefor.

We have no quarrel with the statement of the law as set forth in the opinion of the Court of Appeals, but our position is that there are no facts in evidence in the case at bar to warrant the application of that principle.

The Plaintiff-respondent calls the Court's attention to the following evidence from the record upon which he bases his claim to Findings of Fact and Conclusions at Law in his favor on this issue and contrary to the Findings and Conclusions of the Court below:

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The Plaintiff, after his injury, was treated at Saint Catherine's Hospital at East Chicago, Indiana and was discharged therefrom on "out-patient" treatments, October 8, 1947. Hospitalization and the physician who treated Plaintiff were furnished and paid for by the Defendant. At page 21 and 22 of the record, Plaintiff testified as follows:

> "After taking the stitches out, I took heat treatment, what they call heat, some machine there or something. They told me to bathe it in hot water, at home. After I left the hospital on October 8th, I went back four or five times later upon the 11th or 12th, the first time; then I had to go out every other day. The last day I went out there was the day after Christmas, December 26th, when I got a release from Dr. Cole. He wanted me to go to work before that, so I asked him, 'Well, you have got to give me a release of some kind, so I can go.' So he did on the 26th, the day after Christmas.
>
> "I made about three trips a week, so that would be about twelve a month. It cost $5.01 for a complete round trip from Chicago to Indiana Harbor, street car fare and all. After the accident, I tried to go to work the following April for Great Lakes Dredge & Dock Company as a fireman. Well, the first day there was no engineer there, and I did not do any work. I just got paid for it, but there was no firing on the first day. So, I don't know what happened. But the second day I came out and tried to work, and could not make it. My hand hurt. I could not pick up a shovel, could not pick up the slide bar, the hose and stuff we use to clean fires.

Page 24 - "The first time I actually went to work, to continue to work steady was May 17, 1948.

Page 30 "In 1947 and 1948 it cost me $5.00 per day for food and maintenance or support. No part of that support or maintenance has been paid to me by Fitz Simons & Connell Dredge & Dock Company.

Page 56 "I did not work in the winter of 1947-48 because there was no call for me, and I was not able to."

The Defendant offered no evidence to refute these facts testified to by the Plaintiff.

The record conclusively shows that the Plaintiff made three (3) trips per week from the City of Chicago to Indiana Harbor to December 26, 1947, a total of thirty-three (33) trips at $5.01 per trip for a total of $165.33. This is his expense for cure or care.

The evidence conclusively shows that he was injured on September 29, 1947 and was able to work for the first time on May 17, 1948 and was disabled and required to maintain himself for a period of 232 days at $5.00 per day for maintenance, for a total of $1,160.00.

The Court of Appeals should have made findings of fact awarding the Plaintiff a recovery for maintenance and cure and providing by Decree the recovery of interest at 7% upon the same. Interest is commonly allowed on appeal.

Hagerman vs. Moran (1896) 75 F. 97 (CCA 9th)

The Glenochil (1904) 128 F. 963 (D.Del.)

The Gladiator (1898) 223 F. 381

The Axby (1897) 83 F. 720 (CCA 4th)

The law as it exists in the United States apart from treaties and statutes may be described as follows:

> It is a general rule of Maritime Law that a seaman falling sick or injured while in the service of the ship is entitled to maintenance and cure to be supplied by the Ship Owner and Master.
>
> The negligence of the seaman does not deprive him of this right; nor does he lose it by a violation of his shipping Articles which would justify his discharge.

The Court of Appeals takes the position that in reference to maintenance and cure, "expenses that would have been avoided by use of the free services of the Maritime Hospitals of the U.S. Public Health Service cannot be recovered as maintenance and cure."

We respectfully submit that it is in error.

> "Statutes establishing Public Health and Marine Hospitals maintained by the Federal Government do not repeal or take away the seaman's right under the Maritime Law to be cured at the expense of the ship, but are auxiliary thereto. The right is incident to his contract of employment. Accordingly, a disabled seaman is not obliged to accept an

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offer of treatment in a Public Service and Marine Hospital, but may require the vessel to fulfill its obligation in respect to care and medical attention."

48 Am. Jur. - Shipping - Par. 175

Holt vs. Cummings - 102 Pa. 212, 48

Am. Rep. 199

Anno. 4 - L.A.R. (N.S.) 77

7 Ann. Cas. 209

This Court may allow the successful party in the Appeal, costs in the District Court as well as Appellate costs.

Todd Erie - Basin Dry Dock vs. Penelope
148 F. (2d) 884.

On the basis of the undisputed Affidavit as to said costs appearing in the record herein, Plaintiff-petitioner is entitled to total costs in the sum of $280.88 for costs heretofore accrued and due exclusive of the instant Appeal.

CONCLUSION

The evidence in this case, clearly establishes all the allegations of Counts II and III of the Complaint, imposing liability upon the Defendant-respondent for breach of the duties as set forth therein, all of which requires that the judgment below should be reversed and judgment ordered in behalf of the Plaintiff-petitioner in the sum of $165.33 for medical expense and cure; $1,160.00 for maintenance and $280.88 for costs exclusive of the instant Appeal, or a total of $1,606.21, together with interest at the rate of 7% per annum from September 29, 1947 to the date hereof.

The case should be remanded to the Court of Appeals with directions to enter judgment as aforesaid.

RESPECTFULLY SUBMITTED,

IRVING BREAKSTONE
140 North Dearborn Street
Chicago 2, Illinois
STate 2/2922

IRVING BREAKSTONE
Attorney for Plaintiff-petitioner

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OPPOSITION

BRIEF

Office - Supreme Court, U.S.
FILED
JAN 28 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 411

CHARLES MULLEN,
Petitioner,
vs.
FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW.

The opinion of the court below is reported in 199 F. 2d 557 (1952). The opinion of the district court is not reported but is set out at page 9 of the transcript prepared for the appeal below.

A previous appeal followed trial of the cause and judgment for respondent by directed verdict on all counts of petitioner's complaint, including the counts for maintenance and cure at issue here. The Court of Appeals sustained the directed verdict for respondent on petitioner's claim for

Jones Act indemnity, holding that injury was caused, no by negligence of respondent, but by his own failure to per form his known duty as deckhand. *Mullen* v. *Fitz Simon & Connell Dredge & Dock Co.*, 191 F. 2d 82 (CA 7, 1951) cert. den. 342 U.S. 888 (1951).[1]

On the second and third counts, for maintenance (sub sistence during disability) and cure (medical care and attention), the Court of Appeals stated that "no proof ap pears of any amount owing plaintiff for cure and main tenance" but it remanded these counts to the trial cour for the making of findings of fact and conclusions of law on the admiralty side, where alone there was jurisdiction o these admiralty counts in the absence of diversity of citi zenship between the parties.[2] This Court denied certiorar to the present petitioner. (342 U. S. 888 (1951)

On remand after argument and submission of briefs the trial court again, this time as an admiralty tribunal

[1] The Court of Appeals held:

"We believe that the trial court properly directed a verdict o count one of the complaint, because viewing the evidence in the ligh most favorable to plaintiff, together with all reasonable inference and deductions which may be drawn therefrom, **Giliberto v. Yellow Cab Co.**, 7 Cir., 177 F. 2d 237; **Reno Sales Co., Inc. v. Pritchard Industries, Inc.**, 7 Cir., 177 F. 2d 279, it appears that his injury wa caused solely by his failure to perform his known duty as a deck hand. He did not shut the galley door, when he saw that the tug was going out into the lake in a heavy sea. The evidence convincingly shows that his own negligence was the proximate cause of hi injury."

Final judgment has now been entered on Count I for Jones Act indem nity and petitioner has submitted thereto; no question involving tha count was raised in this second appeal, and none is raised by the presen petition.

[2] By its direction of a verdict in defendant's favor on Counts 2 and 3 the trial court had found that on all the evidence most favorable t plaintiff there was no basis for recovery of maintenance and cure. I remanding, the Court of Appeals did not express disapproval (indeed it stated that no proof of any amount owing for cure and maintenance was presented) but merely found that the court, sitting as an admiralty tribunal, should enter whatever finding the evidence might warrant giving petitioner the opportunity to offer further evidence, and re manded in order that that procedure could be carried out. Petitioner offered no further evidence. [Finding No. 14]

held that no right to maintenance and cure had been made out. This second decision adverse to petitioner's allegations of claim for maintenance and cure was made upon the same record as before since petitioner did not offer any further evidence. No additional evidence was offered nor did petitioner point to any new evidence, although as the findings show (Finding No. 14) he was challenged to do so.

On the *de novo* appeal below, the Court of Appeals concurred in the admiralty findings and decision of the admiralty trier, and it is upon those concurrent findings of fact of the courts below that petitioner seeks certiorari here to review the rejection of the admiralty claim to maintenance and cure.

ARGUMENT.

The matter involved here is an admiralty claim for maintenance (subsistence during disability) and cure (medical care and attention). Nothing else was asserted before the Court of Appeals upon the last appeal, upon which this petition for certiorari is predicated. Nothing else is asserted here.

The total amount claimed by petitioner to be in issue, aside from interest and costs, is $1,325.33. (Petition, p. 13).

The legal reasons why his claim was denied below are:

1. Maintenance and cure is not awarded when the injury in question is caused solely by the seaman's own wilful disobedience of orders and culpable failure to perform his known duty in the service of the ship.

2. Petitioner's hospital and medical bills were paid for him, and no proof appeared of any amount owing petitioner for maintenance and cure.

The concurrent findings of the courts below read as follows (Tr. 15 *et seq.*):

> "Plaintiff is a seaman with thirty-three years experience on the Great Lakes. On September 22, 1947, he was employed as an extra by defendant, working as a deckhand on the tug boat John J. Roche, which was engaged in towing loaded scows from Indiana Harbor into Lake Michigan for dumping. The tug was about 84 feet long overall, 20 feet wide, 12½ feet in depth, of which 14 inches was above the water line. Above the deck's level was a deck house and forward

a pilot house. The deck house had several doors which, when closed, kept out the lake water. Among his duties, the deckhand was supposed to close these doors in rough weather. In the middle of the deck house, on the starboard side, was a fire hole door, in addition to the door to the pilot house. Next, astern, was an engine room door, and farthest back, at the end of the deck house, was a galley door. Inside this door, steps led down to the galley below the deck, a hand rail was provided for use on these steps. The galley door was about three feet wide and five feet high. It was made of steel and swung outward, with hinges on the side toward the front of the tug. A hook attached to the deck house wall could be hooked over the top of this door to keep it open.

"2. A captain, engineer, two firemen, and deckhand, as required by the steamboat inspectors, made up the crew. Plaintiff was the deckhand. The boat was regularly inspected by the United States Steamboat inspectors, as required by law.

"3. Handling mooring lines, helping the fireman in dumping ashes from the boiler room, and closing hatches, when necessary to keep the tug from taking water in rough weather, were among the duties of the plaintiff as deckhand.

"4. The tug was docked in Indiana Harbor, an artificial harbor, formed by breakwaters facing the lake with a gap, through which vessels pass, near the center of the Harbor. At the gap of this inner breakwater, a green light is fixed. A second breakwater projects directly into the lake proper at the end of which is fixed a white light. Going toward the lake, after passing the gap in the inner breakwater, marked with the green light, a ship is in the lake proper. Passing beyond the breakwater with the white light, puts the vessel farther out into the lake.

"5. After arriving for work at the Indiana Harbor dock on the morning of September 29, 1947, plaintiff saw that the lake was heavy and rough. From the

dock, plaintiff could see the water spray striking
top of the catwalk astride the breakwater enclos
the harbor. Within the harbor the water was chop
The number of scows that can be towed on a gi
day depends on the weather. The condition of
weather can best be determined from an examinat
out in the lake itself. This is called "going out
look at the weather". Plaintiff had gone out to l
at the weather on tug boats many times before.

"6. A civil engineer employed by defendant, a
a scowman, who rode loaded scows, accompanied
crew of the Roche when the captain gave the order
go out and look at the weather. When the whis
signal was given, plaintiff cast off his mooring lin
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proceeded toward the breakwater gap which afford
access to the lake. A standing order aboard the Roc
required the deckhand to close up the tug in hea
weather. Plaintiff was told about the standing ord
and also testified it was his job as deckhand to
that. He further testified that the tug should ha
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given by the captain as to the standing order.

"7. After passing the gap in the breakwater, t
Roche entered the lake and ran into a heavy sea, whi
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as he stood on the first or second step leading downward to the galley, with his hand between the door jamb and the hinged side of the galley door. While in this position the door closed, pinching his right hand. No one on board witnessed the accident. A hand rail was provided for holding on, located on the steps directly in front of plaintiff as he stood there facing forward. Plaintiff said he never used the hand rail and he did not use it on this occasion. Plaintiff said the accident happened as the tug was turning around, stating that he jumped into the galley stairway before the tug began to turn.

"8. Viewing the evidence in the light most favorable to plaintiff, together with all reasonable inferences and deductions that may be drawn therefrom, it appears that his injury was caused solely by his failure to perform his known duty as a deckhand. He did not shut the galley door when he saw the tug was going out into the lake in a heavy sea.[1]

"9. Besides the uncontradicted standing order, the captain told Mullen on the very occasion to close up the tug.

"10. While Mullen said he was dumping ashes, the two firemen, one of whom had no connection with defendant at the time of trial or for some years theretofore, who would have known if ashes were being dumped, and with one of whom Mullen claimed he was working, testified that no ashes were dumped that day. It does not appear from the weight of substantial, credible evidence what Mullen was doing out on deck. The ashes were in the fire hole, which had its own door.

"11. When plaintiff was employed he did not live on the tug, but at home. He was an extra worker and

[1] All of the findings set forth were made by the courts below sitting in admiralty. Those which precede this footnote were made by the admiralty trier and the Court of Appeals on **uncontradicted** evidence (and had been made in another connection in disposing of the Jones Act indemnity claim, which is no longer before the Court, not having been involved in the appeal from whose result this petition for certiorari arises.)

his employment was uncertain. On the day of the accident, September 29, 1947, the tug Roche was working out of Indiana Harbor and plaintiff was hospitalized there. Tug work is seasonal. The plaintiff testified, referring to the work season, that this was late, that the job could end at any time, and if it did he would probably be out of work for quite a while. He left the hospital, he says, on or about October 8, 1947, returning to his home in Chicago, Illinois, where the services of the Marine Hospital of the United States Public Health Service were available to him for cure and maintenance without charge, as a seaman. After leaving the hospital plaintiff voluntarily elected to visit Indiana Harbor, Indiana, from time to time for treatment, consisting of the application of heat, instead of availing himself of the Chicago Marine Hospital, whose facilities were mentioned to him by defendant in writing for anything he might require as cure and maintenance. It does not appear that the heat treatments would have prevented plaintiff's employment, if there had been any employment for him.

"12. Plaintiff says that at some time before December 26, 1947, his doctor wanted him to go back to work because it would be good for his hand, but plaintiff refused to do so, insisting on some kind of a release which his doctor gave him on December 26, 1947. Plaintiff did not work during this off-season, there being no "call" for him. He did work as a deckhand throughout the next season, and the season following, at increased wages, but again he did not work in the following off-season, there being no call for him.

"13. Plaintiff's hospital and medical bills have been paid for him, and no proof appears of any amount owing plaintiff for maintenance and cure.

"14. Since the mandate plaintiff has been asked to state his position and has been challenged by defendant on brief to indicate any new evidence he might desire to offer, or any new evidence not merely cumu-

lative or not available by proper diligence at the trial. Plaintiff has not specified any new evidence."

The "questions specifically brought forward by the petition for writ of certiorari"[2] are three in number.

Two of the three are met by the rule of this Court in admiralty and equity that it will not overhaul concurrent factual determinations of the courts below. *Just* v. *Chambers,* 312 U. S. 383, 384 (1941); *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 474 (1937); *The Carib-Prince,* 170 U. S. 655, 658 (1898). The third is settled by a great body of authority in the federal courts and by the decisions of this Court (*Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 531 (1938), no authority whatever to the contrary in this Court or any lower federal court being cited by petitioner.

The questions brought forward are:

1. Petitioner asks:

> "Whether the Plaintiff forfeited his right to medical cure and maintenance at the expense of the Defendant-appellee by reason of evidence in the case substantiating that the injuries to the Plaintiff-appellant were 'caused solely by the seaman's own willful disobedience of orders and culpable failure to perform his known duty in the service of the ship.'" (Petition, p. 4)

In the supporting brief petitioner makes it plain that he is not challenging the rule of law involved in the question. On the contrary he says flatly that he agrees with the rule applied by the courts below:

> "We have no quarrel with the statement of the law as set forth in the opinion of the Court of Appeals, but our position is that there are no facts

[2] "Only questions specifically brought forward by the petition for writ of certiorari will be considered". Supreme Court Rules, Rule 38(2).

in evidence in the case at bar to warrant the application of that principle." (Br. 20).[3]

The correctness of the legal rule (*Warren* v. *United States,* 340 U.S. 523, 528 (1951); *Barlow* v. *Pan Atlantic S. S. Corp.,* 101 F. 2d 697, 698 (CA 2, 1939)) is accordingly not here in question. It is purely a question whether there was some substantial evidence to show wilful disobedience of orders and culpable failure to perform known duty to ship. Both courts below found that the proof on that point was plain—even on the undisputed evidence. We have quoted heretofore in full the findings in which the courts below concurred. Among others, concurrent findings addressed to this point are:

"5. After arriving for work at the Indiana Harbor dock on the morning of September 29, 1947, plaintiff saw that the lake was heavy and rough. From the dock, plaintiff could see the water spray striking the top of the catwalk astride the breakwater enclosing the harbor. Within the harbor the water was choppy. The number of scows that can be towed on a given day depends on the weather. The condition of the weather can best be determined from an examination out in the lake itself. This is called "going out to look at the weather". Plaintiff had gone out to look at the weather on tug boats many times before.

"6. A civil engineer employed by defendant, and a scowman, who rode loaded scows, accompanied the crew of the Roche when the captain gave the order to go out and look at the weather. When the whistle signal was given, plaintiff cast off his mooring lines, one of the firemen cast off the other line, and the tug proceeded toward the breakwater gap which af-

[3] Before the Court of Appeals the petitioner took the same position. He stated:

"We have no quarrel with the statement of law as set forth in the opinion of the District Judge (see Appendix) but our position is that there are not facts in evidence in the case at bar to warrant the application of that principle."

forded access to the lake. A standing order aboard the Roche required the deckhand to close up the tug in heavy weather. Plaintiff was told about the standing order, and also testified it was his job as deckhand to do that. He further testified that the tug should have been closed up in weather such as he could see from the dock before he started out into the lake. The captain testified that he told plaintiff personally that standing orders required him to close up in heavy weather. There was no contradiction to the testimony given by the captain as to the standing order.

"7. After passing the gap in the breakwater, the Roche entered the lake and ran into a heavy sea, which impeded its speed. The decks of the Roche were awash from waves of water. At times, the waves hit the breakwater causing a spray of water forty to fifty feet high. Plaintiff could see that the tug was going beyond the end of the breakwater projecting into the lake. As the tug proceeded, plaintiff said he was dumping ashes into the lake and when it became too rough to remain on deck he headed inside by way of the galley door, that being then the last door astern on the starboard side. A wave of water followed him in as he stood on the first or second step leading downward to the galley, with his hand between the door jamb and the hinged side of the galley door. While in this position the door closed, pinching his right hand. No one on board witnessed the accident. A hand rail was provided for holding on, located on the steps directly in front of plaintiff as he stood there facing forward. Plaintiff said he never used the hand rail and he did not use it on this occasion. Plaintiff said the accident happened as the tug was turning around, stating that he jumped into the galley stairway before the tug began to turn.

"8. Viewing the evidence in the light most favorable to plaintiff, together with all reasonable infer-

ences and deductions that may be drawn therefrom, it appears that his injury was caused solely by his failure to perform his known duty as a deckhand. He did not shut the galley door when he saw the tug was going out into the lake in a heavy sea.

"9. Besides the uncontradicted standing order, the captain told Mullen on the very occasion to close up the tug."

We do not understand that this Court will overhaul the concurrent determinations of fact by the District Court and Court of Appeals below. The authorities in this Court are numerous and familiar:

"As the decision of the District Court was unanimously affirmed by the Circuit Court of Appeals, we do not think there is any such preponderance of evidence as would justify us in disturbing their conclusions."

The Iroquois, 194 U. S. 240, 247-248 (1904).

"These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 474 (1937) (An equity matter).

"In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule we accept the concurrent findings of the courts below us on these matters (citing auth.) and we confine our attention to the question of the survival of the causes of action."

Just v. *Chambers,* 312 U. S. 383, 384 (1941) (An admiralty matter).

This Court's doctrine as to the force of concurrent findings of fact below, originating in admiralty and later

extended to equity (*Towson* v. *Moore*, 173 U. S. 17, 24 (1899)), is particularly applicable to admiralty situations, where it is often remarked that the subject matter makes it peculiarly difficult for a reviewing court to substitute itself on matters of fact for an experienced district judge who heard and saw the witnesses.

If the question whether the facts support wilful disobedience and culpable misconduct were one on which this Court's function were that of a trier of fact, we should argue as we did by brief below, where our position was sustained:

> "The trial court found that plaintiff was guilty of 'wilful disobedience of orders and culpable failure to perform his known duty in the service of the ship.' That, he held, under the applicable rules of law, disqualified Mullen from recovering maintenance and cure—quite apart from the facts, also found, that Mullen had failed to prove any amount due him for maintenance and cure. The trial judge said:
>
> > "'It is my conclusion that maintenance and cure, allowed to seamen injured in the service of the ship regardless of the employer's negligence or their own want of ordinary care, is not awarded when the injury in question is caused solely by the seaman's own wilful disobedience of orders and culpable failure to perform his known duty in the service of the ship.' (Tr. 13)
>
> Plaintiff concedes, as indeed the authorities he cites compel him to do, that this statement of law by the trial judge is correct. (Br. 10) 'But,' he states, 'our position is that there are not facts in evidence in the case at bar to warrant the application of that principle.' (Br. 10) 'There is no evidence in the record,' he says, 'to support any charge of "wilful" disobedience or "culpable" failure on the part of Mullen.'
>
> "Plaintiff closes his eyes to the detailed recital of the evidence contained in this Court's opinion and

mandate on the earlier appeal in which this Court held that plaintiff's 'injury was caused solely by his failure to perform his known duty as a deckhand.' That recital of the evidence spelled out in detail, on uncontradicted evidence (and allowing Mullen every reasonable inference), that Mullen was guilty of culpable misconduct, indiscretion, wilful disobedience of orders, and disregard of his seaman's duties. The Court of Appeals' dispassionate statement is crystal clear. Contrary to his orders and his known duty, plaintiff let this small tug with only 14 inches above the water line, go out with a deckhouse door wide open into a 'heavy sea' that was throwing the spray 40 feet in the air at the breakwater, seeing the situation, knowing, as he testified, that the tug should have been closed up, knowing it was his duty to shut the deckhouse door, and let it continue with that door wide open in that sea, that slowed the vessel down, with her deck awash, all in violation of his standing orders, until he was driven in by a wave that 'filled the door.' What plaintiff did would shock any mind, to say nothing of a seaman of thirty-three years experience who admits he knew better. Plaintiff saw the situation, he said the door should have been shut in such weather as he could see before he left the dock, he knew his duty was to shut the door, he knew his orders required him to do that, he knew that if he did not shut the door the heavy sea that was dashing spray 40 feet over the breakwater would come into the vessel with its low, 14-inch freeboard—and he did not shut the door—'• • • it appears that his injury was caused solely by his failure to perform his *known duty* as a deckhand. He did not shut the galley door, when *he saw* the tug was going out into the lake in a heavy sea.' (Our emphasis) (*Mullen* v. *Fitz Simons & Connell Dredge & Dock Co., supra,* 84.)"

The decision of the court below upon the question of fact presented was clear and direct:

> "The plaintiff-appellant, in the case now under consideration, was not entitled to maintenance and cure from the defendant-appellee because the court found that his injury resulted from 'his' wilful disobedience of orders and culpable failure to perform his known duty in the service of the ship. (Auth. cit.)
>
> • • •
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> "All the findings of fact made by the admiralty court are supported by substantial evidence."
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> *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 199 F. 2d 557, 560 (1952).

The question petitioner raises here is whether these facts present any substantial evidence at all. That is the only question on that point argued by the supporting brief. (Brief, p. 20).

The trouble with the argument is that it overlooks the two court rule, to say nothing of the mass of evidence in the record.

Both courts below said Mullen knew the vessel ought to be closed up in heavy weather like that he could see from the dock and that it was his duty to do so. Both courts pointed out that Mullen himself so testified.[4]

Both courts found there was a standing order on the vessel requiring the deckhand to close up in heavy

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[4] For example: (Tr. 80)

"Q. Is that a good idea to have waves coming in tugboats? What is your view of that as a seaman?
A. It is a bad idea.
Q. How do you prevent it?
A. Well, by shutting the door.
Q. Whose job is that?
A. By fastening everything down. That is the deckhand's job.
Q. And especially in weather like you could see you were going to get into before you ever started out from the dock?
A. That is right."

Plaintiff was the deckhand. (Tr. 67, 54)

weather. The captain so testified (Tr. 154) and no one denied it.

Both courts found that a specific order to close up had been given on the very occasion. The captain so testified on cross-examination (Tr. 165) and Mullen denied it (Tr. 182).[5] The advantage of the trier passing upon such conflicts in admiralty matters is frequently commented upon.

Both courts found that petitioner did not close the deckhouse door—neither before the vessel started out into the lake nor at any time while the vessel pressed forward in the heavy waves, with her decks awash, for a distance of a quarter of a mile past the last breakwater protection.

Disregard of *known* duty (reinforced here by standing *orders*) under circumstances recognized as calling for its performance, is nearly the height of wilful misconduct. "He further testified that the tug should have been closed up in weather such as he could see from the dock before he started out into the lake * * *." (191 F. (2d) on 84). To close it up was his "known duty" (191 F. (2d) on 84). To fail to do one's known duty in circumstances actually recognized as calling for its performance, with the consequence that the water was bound to come into the low lying vessel in the heavy sea was a reckless disregard of the safety of himself, his vessel, and his shipmates. That it was in direct violation of standing orders underscores the fact. A man who, in violation of his orders and known duty, acts in such disregard of the safety of his vessel, is guilty of something more than mere want of "ordinary care". This is not the ordinary negligence in the course of faithful service

[5] References are to the record on the earlier appeal, which has been incorporated in toto in the present record.

to the ship, that admiralty will overlook. It is the conduct "prejudicial to the ship's service" that the admiralty will not condone, and which, when it results in the seaman's injury, forfeits maintenance and cure. (*The Ben Flint,* 3 Fed. Cas. 183, 195 (D.C. Wis.); *Barlow* v. *Pan Atlantic S. S. Corp.,* 101 F. 2d 697, 698 (CA 2, 1939); *Warren* v *United States,* 340 U. S. 523, 528 (1951)).

Petitioner would have it that to be disqualifying from maintenance and cure, the seaman's conduct must be suggestive of "moral turpitude". No court ever said so. On the contrary, it is not the moral sanction, but the "prejudice of the ship's service and discipline" that raises the disqualification. *The Ben Flint,* 3 Fed. Cas. 183, 195 (D.C. Wis.). It prevents recovery by a drunken seaman who promotes fights with shipmates aboard ship as in *The Mexican,* 78 F. (2d) 819 (1935), or by a seaman whose incapacity from venereal disease leaves a ship shorthanded, as in *Chandler* v. *The Annie Buckman,* 5 Fed. Case No. 2591A (D.C.); or by a seaman who holds himself out as fit when he has a disability disease, as in *Tawada* v. *U. S.,* 162 F. (2d) 615 (CA 9, 1937). Seamen have been said to be more prone to some types of culpable misconduct; violation of their known duty is not their common failing. But violation of orders and known duty certainly is culpable misconduct, and culpable misconduct affecting the ship's service is the test, not moral turpitude. *Barlow* v. *Pan Atlantic S. S. Co.,* 101 F. (2d) 697, 698, and cas. cit.; *Warren* v. *United States,* 340 U.S. 523, 528 (1951).

The courts below found on these matters upon uncontradicted evidence that Mullen's job was to close up the vessel; that he saw from the dock that she should be closed up in such weather; that the orders were to close

up in such weather; and that he ignored his known duty to his vessel, his shipmates and himself, and disobeyed his orders, which was the sole cause of the accident. Petitioner makes no attempt to contradict these matters now, as, indeed, he could not.

Once such facts are found, as they were found by the two courts below, in admiralty, there is an end to any pretense that petitioner is entitled to cure and maintenance at the expense of the employer whom he has disobeyed, to the jeopardy of himself, his shipmates and his vessel.

The concurrent findings of the courts below spell out disobedience of orders and disregard of duty in the presence of circumstances seen by petitioner to call for performance of those orders and of that known duty, as the sole cause of the accident, leaving the low-lying vessel wide open when she was going out into a high, rolling sea that threw the spray 40 feet in the air, so that waves could "fill the door" and come into the vessel. That is culpable, wilful, gross misconduct, or nothing is. Disobedience by seamen of reasonable shipboard orders is highly culpable; disobedience of this order, so necessary to the safety of the vessel, especially in the face of these conditions of weather, was gross misconduct. Such disregard of orders and of "known duty" when, as he himself says, plaintiff saw the conditions and knew they called for performance of the duty and the order, was wilful disobedience. No admiralty court ever yet rewarded such wilful disobedience with maintenance and cure. Petitioner has not cited and cannot find any case allowing cure and maintenance under such circumstances of culpable misbehavior. Under the rule that the seaman cannot recover maintenance and cure when his injury

due solely to his own culpable misconduct, there could possibly be any such case.

All these facts were spelled out by the Court of Appeals on the first appeal on the uncontradicted evidence for the purpose of passing on the common law count which is no longer in dispute, and was not involved on present appeal or in the present petition); they were found by the district court sitting in admiralty on the maritime claim for maintenance and cure—on the uncontradicted evidence. *In addition* the district court as trier of fact in admiralty and the Court of Appeals on the *de novo* appeal concurred in the further finding that not only was there a standing order (as the uncontradicted evidence showed) but also that the captain told petitioner *on the very occasion* to close up the vessel. (Finding No.

With such testimony indelibly upon the record, petitioner's argument that there is no support for the concurrent findings must fail. And upon such findings, the law is clear—as petitioner concedes—that the guilty seaman is not entitled to recover maintenance and cure.[6]

The second alleged "question presented" mentioned in the petiton is:

"Whether an injured seaman is deprived of his right to expenses of medical care and cure because he is required to avoid such expense by use of the free services of the Marine Hospitals of the United States Public Health Service, and that the availability

[6] Respondent has nevertheless borne the costs of Mullen's medical and hospital expenses. Mullen testified these cost him nothing. (Tr.

of this service prevents his recovery for maintenanc as well as cure."[7] (Petition, p. 5)

The "expenses of medical care and cure" to which pet tioner refers are travel expenses of $165.33 for trips to clinic at Indiana Harbor, Indiana, from petitioner's hom in Chicago.

The concurrent courts below found:

"11. * * * He left the hospital, he says, on o about October 8, 1947, returning to his home in Chi cago, Illinois, where the services of the Marine Hos pital of the United States Public Health Service wer available to him for cure and maintenance withou charge, as a seaman. After leaving the hospital plain tiff voluntarily elected to visit Indiana Harbor, In diana, from time to time for treatment, consisting o the application of heat, instead of availing himsel of the Chicago Marine Hospital, whose facilities were mentioned to him by defendant in writing for any thing he might require as cure and maintenance. It does not appear that the heat treatments would have prevented plaintiff's employment, if there had been any employment for him." (Finding No. 11, *supra*)

* * *

"13. Plaintiff's hospital and medical bills have been paid for him, and no proof appears of any amount owing plaintiff for maintenance and cure." (Finding No. 13, *supra*)

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[7] Under the section "Reasons Relied on for the Allowance of the Writ," petitioner rephrases the point. He says:

"2. The Court of Appeals in its decision to the effect that the Plaintiff should be denied expenses of cure because the Defendant tendered him admission to the Maritime Hospital, is in error and contrary to the decisions and established authority.

As thus stated, the question is moot. Petitioner himself testified that he paid nothing for the medical or hospitial expenses arising from his accident (Tr. 80) as the concurrent courts below also found:

"Plaintiff's hospital and medical bills have been paid for him, and no proof appears of any amount owing plaintiff for maintenance and cure."

(Finding No. 13, supra)

The Court of Appeals concluded below:

> "* * * Since the record discloses that medical and hospital charges for treatment were actually furnished him, and since he could have had any additional treatment required without costs through the facilities of Public Health Service, we are constrained to hold that the trial court sitting as a tribunal in admiralty properly dismissed his action for maintenance and cure."
>
> *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 199 F. 2d 557, 560-561 (1952).

This point has been ruled on many times by the lower federal courts: *e.g. United States* v. *Loyola*, 161 F. 2d 126, 127-128 (CA 9, 1947); *Bailey* v. *City of New York*, 153 F. 2d 427 (CA 2, 1946); *Marshall* v. *International Mercantile Marine Co.*, 39 F. 2d 551 (CA 2, 1930). And it was put to rest in accordance with the doctrine so held for many years in many federal district courts and Courts of Appeal by the decision of the Court in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938):

> "* * * Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service. (Cit. cases). * * *"

Petitioner cites no conflicting federal authority to the contrary.[8]

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[8] The holding of the Court of Appeals against petitioner was alternative. Even had the lower court been willing to disregard the holding of this Court and the other federal courts, and allow petitioner to prevail on this point, his wilful disobedience of orders and culpable failure to perform his duty as found by the concurrent courts and his failure of proof would have defeated him.

Since petitioner lived in Chicago, Illinois, where free medical service was available to him, his attempt to charge respondent with traveling expenses to another state (Finding No. 11, **supra**) might be thought to be peculiarly subject to the principle that a man cannot recover as damages expenses that he might have avoided.

3. Petitioner's third alleged "Question Presented" is:

> "Whether or not there is evidence in the record sufficient to enable the Court to fix the amounts due the Plaintiff-appellant for maintenance and cure." (Petition, p. 5)

Both courts below found the record lacked proof to show what, if anything, was due the petitioner for maintenance after the payments made *ex gratia* by the respondent.

The concurrent finding was:

> "13. Plaintiff's hospital and medical bills have been paid for him, and no proof appears of any amount owing plaintiff for maintenance and cure."

Additional findings further spell out specifically the inadequacy of the proof.

In view of the authorities in this Court that concurrent findings below will not be overhauled here (*supra*, p. 12), petitioner's argument here would have to be that these facts present no substantial evidence to support the findings.

But petitioner himself made the record and it is his own uncontradicted testimony which spells out the failure of proof and provides the basis for each finding made by the concurrent courts below.

It was petitioner's own testimony that all his hospital and medical expenses were paid for him (Tr. 80; Finding No. 13).

It was petitioner's own testimony that tug work was seasonal and that this was a late season job which could end at any time; he was forced to admit that during this

off-season, (1947-1948) although he was on call, there was no call for him and again during the next off-season (1948-1949) he received no call for any employment. Petitioner's argumentative statement on brief that after his injury on September 29, 1947, "he was able to work for the first time on May 17, 1948, and was disabled and required to maintain himself for a period of 232 days at $5.00 per day * * *" while it avoids saying so specifically, is meant to be understood as meaning that he was required to maintain himself *because* he was *disabled* during that time, but that was not what his testimony said.

Again, it was petitioner's own testimony that following his discharge from the hospital (where with the medical care provided him by respondent, he also received his maintenance) his doctor wanted him to go back to work sometime (his proof does not show when) before his out-patient treatment was completed, because it would be good for his hand. Rights to maintenance and cure, if any, cease when a seaman is pronounced fit for duty.

For aught that appears, plaintiff would have been actually benefited from work as soon as his in-patient treatment, that he might have had free in the Chicago Marine Hospital, would have ended.

Given an opportunity to supplement the record which had led the Court of Appeals on the previous appeal to say "no proof appears of any amount owing the plaintiff for cure and maintenance", petitioner was not able, or did not choose, to offer anything.

He cannot recover maintenance when he was not working, contrary to his doctor's advice that he should work, and when what the hand needed was work, as he admits his treating physician (whom he did not call) told him. He could not recover maintenance while he was not work-

ing for the reason that there was no work for him during the off-season.

The record is devoid of any proof of any amount owing petitioner for maintenance or cure. That is what the concurrent courts found below, on petitioner's own uncontradicted testimony:

> "Plaintiff's hospital and medical bills have been paid for him, and no proof appears of any amount owing plaintiff for maintenance and cure." (Finding No. 13, *supra*)

The findings then, which the petitioner would have the Court overhaul, despite its often expressed rule, are concurrent findings of the courts below based upon uncontradicted testimony of the petitioner himself, which he could not or did not choose to augment when given the opportunity and challenged to do so.

CONCLUSION.

Two of the questions brought forward seek reexamination of concurrent findings of fact of the two courts below and a third seeks review of a legal principle on which decisions are not in conflict. No basis for issuance of the writ of certiorari is presented. The petition should, therefore, be denied.

Respectfully submitted,

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